FOUR GERMAN JURISTS. II.

BRUNS, WINDSCHEID, JHERING, GNEIST.

V. (*Continued.*)

JHERING'S next attack upon "abstract" legal theory was directed against the current explanation of the protection accorded by Roman law to the possessor as such, whether the possession be rightful or wrongful, honest or dishonest.[1] The German literature of this century on the law of possession is very extensive: when, in 1889, Jhering returned to this field, his second book[2] was at least the thirtieth treatise on possession that had appeared since Savigny's — doctor dissertations and review articles not included. The English literature can show, within the same period, but one important work on this branch of the law.[3] Why the German mind has been so fascinated — not to say possessed — by this subject is a curious question. In his *Possessory Intention* Jhering hazards the conjecture that it is the imperfect juristic development of the doctrine that attracts the constructive jurist. Possession is inarticulate, "the mollusk of legal institutions"; it is so "soft and flexible" that the jurist can make of it what he wishes; it is "a rubber figure."[4] Here Jhering is less happy than usual in his similes. The *corpus* of possession, the power of control, is a matter of fact; the law of possession has grown up about this hard central fact; and the constructive jurist is attracted not by the ease with which this legal institution can be moulded into logical form, but, on the contrary, by the resistance which it offers to his processes.

[1] Grund des Besitzesschutzes (1868). First published in *Jhering's Jahrbücher*.

[2] Besitzwille (1889). A third and less technical treatise on the subject is to be found in Jhering's article, "Besitz," Handwörterbuch der Staatswissenschaften (1890–92), vol. ii; reprinted in *Jhering's Jahrbücher*, 1893, pp. 41–98.

[3] Pollock and Wright, Possession in the Common Law (Oxford, 1888).

[4] Besitzwille, pp. 284, 285.

There is, however, a good bit of truth in Jhering's statement that the doctrine is imperfectly developed. It was imperfectly developed *in the Roman law*, as is shown by the sweeping changes introduced by mediæval practice and modern legislation. Whether the protection of possession at Rome originally represented the natural reaction of civilized society against the assertion of rights by force, or began in the protection accorded to the occupants of the public lands,[1] the Roman law was steadily working towards a broader principle than the discouragement of self-help, or the defense of the established state of things. In the light of the modern European development, and of the independent but similar results reached in the English law, the goal toward which Roman law was tending seems to be the protection of possession under any sort of title against every other title that is no better than that of the possessor, with the premise that naked possession is itself a title. "Every sort of possessor," says Paulus, "by the very fact that he is possessor, has more right than one who does not possess"; and Ulpian illustrates this statement by saying that the robber who, being asked why he possesses, will only answer, "Because I possess," and will not pretend that he has any color of title, possesses "by title of possession."[2] The principle of relativity of title is recognized in the *actio Publiciana* and in the *condictio possessionis*, for in neither of these actions has the plaintiff to show a good title, but in the first only a color of title, and in the second only that possession has passed from him to the defendant *sine causa;* and in both

[1] The occupants or possessors of *ager publicus* were legally mere tenants at will, holding at the sufferance of the state. In practice their holdings were permanent, were capable of conveyance and devise, and passed to the heirs *ab intestato*. Niebuhr, Römische Geschichte, vol. ii, pp. 150 *et seq.;* Marquardt, Römische Verwaltung, vol. i, p. 155; vol. ii, pp. 98 *et seq.* Niebuhr first suggested that the possessory interdicts were devised for their protection. Dernburg, Entwickelung und Begriff des juristischen Besitzes (1883), has given an elaborate development to Niebuhr's idea. Against Dernburg, Jhering, Besitzwille, p. 124.

[2] "Qualiscumque enim possessor hoc ipso quod possessor est plus iuris habet quam ille qui non possidet." D. 43, 17, 2. "Pro possessore vero possidet praedo, qui interrogatus cur possideat, responsurus sit 'quia possideo' nec contendet se heredem vel per mendacium, nec ullam causam possessionis possit dicere." D. 5, 3, 11, § 1, 12, 13 pr.

actions the defendant wins if he can show a title as good as the plaintiff's. The same principle is partially recognized even in the possessory interdicts, in that the possessor who has obtained possession by force or stealth or revocable permission (*aut vi aut clam aut precario*) has legal relief, in case of arbitrary encroachment or annoyance, against every adversary except the person whom he has ejected, or by whose permission he holds.

But the principle is not fully worked out. The possessory remedies are not granted to all possessors. They are granted to the possessor who thinks himself owner, and to the possessor who knows that he is not. They are granted to the holders of life estates and of perpetual leaseholds, *i.e.*, to all persons holding under such titles. They are granted even to the person "in possession" of a right of way. They are granted to the pledgee in possession and to the stakeholder.[1] They are denied to the ordinary lessee and to the ordinary bailee. Lessees and bailees have not even the relative protection accorded to the tenant-at-will, who is protected against every one except his grantor. Lessees and bailees are mere "natural" possessors, or, as the modern writers call them, "detentors." They have not "juristic" possession. If disturbed or ejected by the lessor or bailor, they have no action except for breach of contract. If disturbed or ejected by others, they must look for protection to the persons for whom they were holding.

In the interdict procedure, moreover, the principle of relativity of right is only faintly developed; the dominant idea seems to be the discouragement of self-help. To this idea, it seems, is to be attributed the exclusion of the so-called *exceptiones petitoriae, i.e.*, the barring of all plea of right on the part of the defendant. When the possessor seeks relief against arbitrary encroachment, or other disturbance, the defendant cannot allege ownership or any other substantive right; he can only plead that the plaintiff's possession, as against him,

[1] *Sequester:* person with whom property is deposited pending determination of its ownership.

the defendant, is "faulty," because the plaintiff has derived possession from him *aut vi aut clam aut precario.* When the plaintiff seeks relief against a forcible ejectment, even this defense is barred. He who has been forcibly ejected is to be restored *because* he has been forcibly ejected. That he had previously ejected his adversary is immaterial; his adversary should have appealed to the law for relief.[1]

Leaving the realm of Roman law and entering that of Roman theory, it should be noted that the Roman jurists declared that possession is acquired and held *animo et corpore.* To be possessor, one must intend to possess; he must have the *animus possidendi;* and he must also have the *corpus;* that is, he must be in control. When possession is held for us by others, — slaves, children or free agents, — we possess *animo nostro, corpore alieno.* Paulus utilizes the *animus* theory to explain the denial of possessory remedies to lessees and bailees. Since these persons intend to hold for the lessor or bailor, and not for themselves, they are not legally possessors.

Starting with these rules of the Roman law and these *dicta* of the Roman jurists, the German jurisprudence of our century has striven to discover the essential nature of that "juristic" possession which the law protects, and the fundamental idea which underlies the protection. It is not wonderful that the task has been found arduous. To an outsider it seems a trifle singular that so many lawyers should have employed their time in such a quest. Why not admit that the Roman distinction between "possession" and mere "detention" is historical, and to some extent arbitrary, and that the protection accorded to possession rests on more than one basis. The answer is, I think, that philosophy instinctively seeks, even in the case of social institutions, a single central idea, a simple and comprehensive explanation, and that the German jurists are nothing if not philosophical.

[1] So in the Justinianean law. In the *Edictum perpetuum* of Hadrian this rule applied only where the second ejectment was accomplished by "armed force" — "hominibus coactis armatisve." The ejected possessor had the right to use ordinary force for the recovery of possession. *Cf.* Lenel, *Edictum perpetuum*, § 245.

Savigny found the central idea of juristic possession in the *animus domini*, the intention of holding against all the world. The lessee and bailee, as Paulus had already said, are not possessors, because they are holding for the lessors and bailors. It is, of course, true that the pledgee and the stakeholder and the tenant at will, who have no *animus domini*, have the possessory actions; but these are anomalies. The ground for the protection of possession Savigny found in the fact that all violence (*Gewaltthätigkeit*) is illegal. This expression leaves it unclear whether he regarded disturbance of possession as illegal because it is an offense against the public order, or because it is an invasion of a private right. Other passages in his treatise indicate that he leaned to the latter theory. The right invaded is not the right of possession, for possession is a fact, not a right;[1] it is the freedom of the person that is attacked, and the protection given to the possessor is "a protection of the personality." Gans gave to this idea a strictly Hegelian expression, asserting that "the will *an sich* is something substantial, something to be protected," and that "the particular will has to yield only to the higher universal will." In various shadings this explanation has been generally accepted; and the central idea of possession, and the ground of its protection, have thus been brought into most satisfactory harmony. The decisive element in possession is the will, and possession is protected because the law respects "the realized will." So Windscheid explains that the distinction between the different kinds of possession "depends upon the possessor's state of mind"; and that "that possession which is associated with the will to have the thing for one's self, which is the realization of the will to appropriate the thing," is legally protected because "the will which has made itself actually valid in this possession is as such, without regard to the rightfulness of its content, worth just as much as any other

[1] This is Windscheid's interpretation of Savigny's position. Savigny himself says (Besitz, p. 44) that "possession is at the same time a fact and a right," but qualifies this statement immediately by explaining that it is a fact in its essence, but resembles a right in its results.

single will which aims to bring the thing under its control."[1] Similarly Bruns :

> Power without will is no more possession than will without power. . . . Will and power must cover each other; the will must go as far as the power, and *vice versa;* and since he alone really wills to control who wills this for himself, and not as mere representative of another, therefore he alone is possessor who wills to have the thing completely for himself. . . .
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> If in the institutions of positive law we see the revelation (*Erscheinung*) of the universal idea of right, and if, accordingly, we seek for such a revelation in this matter of possession, we are instinctively led to the universal right of human personality and liberty, and thus to the principle that the personal will to control, which is realized in possession, needs, as such, to yield to no other will, but only to the law and the forms of law. . . . The basis of the protection of possession lies in the right of the personal possessory will *an sich*.[2]

In his *Basis of the Protection of Possession* Jhering puffed away with a breath these philosophic mists. Will, he declared, is undoubtedly the *vis agens* in the whole field of private law, but only in so far as it is exercised within legal limits. If the "realized will" is entitled to respect and protection, why does the law compel the person who has forcibly ejected a prior possessor to restore possession and pay damages? It is not true, in law, that one will is as good as another; in some cases the law recognizes and protects the "realized will," in other cases it discountenances and nullifies it. Why the law does this cannot be determined by invoking the right of the will *an sich*.[3]

After classifying the various theories, and subjecting them to a searching and in many cases destructive criticism, Jhering

[1] Windscheid, Pandekten, § 148. In justice to Windscheid it should be added that under this philosophical drapery stands the defensible legal idea that disturbance and invasion of possession are *torts*. This is also Savigny's theory. But Bruns expressly rejects it, falling back on philosophy pure and simple.

[2] Bruns, Das heutige römische Recht, in Holtzendorff, 3d ed., pp. 380, 381. In his Recht des Besitzes, § 58, Bruns declares that the will is in its nature free and every coercion of the will is a wrong.

[3] *Cf.* Stahl, Philosophie des Rechts, 5th ed. (1878), vol. ii, p. 304; and Dernburg, Pandekten (1888), § 170.

advances his own explanation. Possession is protected for the sake and in the interest of property, of ownership. The owner is regularly possessor;[1] and whenever this is the case the maintenance of his position as possessor is a much simpler matter than the maintenance of his position as owner. As possessor he is spared the proof of his right; he is protected against encroachment, against every sort of disturbance and annoyance, upon his showing that he is in possession. If ejected, he is put back upon his showing that he was in possession and has been ousted without process of law. Possession is the strongest outwork of the fortress of ownership; and the protection of possession is a necessary complement to the protection of ownership. Of course the better protection thus accorded to owners enures to the advantage of non-owners in possession. That is the price which property has to pay for the advantages it secures in the protection of possession; but the advantages are cheap at the price.

The two chief points in Jhering's theory — facilitation of proof in possessory actions and probable ownership of the possessor — were too self-evident to be new. No practicing lawyer, of any time or race, could fail to appreciate the procedural advantage of resting on possession, and avoiding the *probatio diabolica* of title; from this point of view possession, as the English lawyers say, is "nine points of the law." The presumptive ownership of the possessor was suggested by Placentinus (of Bologna and Montpellier) in the twelfth century, and in the nineteenth Gans momentarily abandoned the contemplation of *Wille an sich* to point out that honest possession was at least incipient ownership, perfectible by prescription. The combination of these points of view, however, was original with Jhering, and the formation of the theory was all his own.

If Jhering had contented himself with presenting this view of possession as *an* explanation of the rules of Roman law, it is hard to see how anybody could have taken issue with him.

[1] Either because he holds the property himself, or because a tenant or bailee holds it for him.

But, like all his countrymen of this century, he was looking for *the* explanation, the basis (*Grund*) of the Roman law of possession.[1] He had rejected other excellent theories, such as the repressal of self-help, the maintenance of public order, *etc.*, because they do not account for all the rules of the law. His opponents, therefore, hastened to point out that his theory does not explain why, in possessory proceedings, the defendant is not allowed to plead title. If the law of possession is based on the interest of the owner, it is quite logical, they declared, to spare him the proof of title when he appears as plaintiff, but quite illogical to deprive him of the opportunity of proving title when he appears as defendant. Jhering had anticipated this objection, and had tried to meet it in his book; but his explanation is far from satisfactory.

Twenty years later, in 1889, Jhering attacked the theory that the intention to maintain control against all the world, the will to hold like an owner (*animus domini*) is the characteristic element in "juristic" possession — the element which distinguishes such possession from the merely "natural" possession of the lessee or bailee. Against this theory, which he terms the "will theory," or "subjective theory," he set up and defended an "objective theory," which may be summarized as follows. The intention of possessing is of course essential to possession, but the intention of possessing for one's self is not essential.[2] The denial of the possessory remedies to lessees and bailees is an arbitrary rule, and its explanation is to be found in the economic and legal development of the Roman state.[3] The Roman tenant farmer (*colonus*) was far more dependent upon his landlord, far more completely under the

[1] Although he had previously recognized, in a general way, that it is sometimes impossible to find a single principle at the basis of a legal institution, and that a given institution may be "according to its primary plan absolutely dual." Geist des römischen Rechts, 3d ed., part ii, div. 1, p. 355.

[2] The Roman jurists spoke only of the *animus possidendi*, or *possidentis*. The phrases *animus domini*, *animus dominantis*, *animus rem sibi habendi*, are mediæval or modern. Only the second phrase, *animus dominantis*, has any basis in the ancient texts; it is a translation of the Byzantine ψυχὴ δεσπόζοντος, found in Theophilus's paraphrase of the Institutes, and in the Basilica.

[3] Besitzwille, ch. viii.

landlord's surveillance and control, than the modern agricultural lessee. The Roman peasant-proprietor, in Republican times, leased but a part of his property, and landlord and tenant cultivated side by side. When land was given by large proprietors for really independent cultivation, it was given *precario*. Similar conditions prevailed in the earlier leases of dwellings: the tenant (*inquilinus*) took only a part of the house; the remainder was occupied by the landlord. It was natural, in both cases, that the landlord was regarded as the possessor, and that the tenant looked to him for protection against disturbance. This was but a slight extension of the authority of the head of the house, the *paterfamilias*. At first he possessed through the agency of his children and slaves; later he possessed through tenants. Children and slaves had only natural possession; tenants have the same. The extension of this rule to bailees seemed a logical necessity. It did little harm, because the protection of possession by the interdicts was much less important in the case of chattels than in the case of real property.[1] Paulus's assertion that lessees and bailees do not possess *ad interdicta* because they do not possess for themselves but for others, simply represents his effort to find a juristic explanation for the established rules of the law. As a piece of juristic construction it is far from admirable. It put a novel meaning into the familiar *animus possidentis;* and it failed to account for the well-established rules which gave the protection of the interdicts to the tenant-at-will, to the pledgee, and to the stakeholder. But in spite of its unsatisfactory character, this explanation of Paulus has been repeated ever since, and has become the basis of the modern theory of juristic possession.[2]

Jhering subjects the "will theory" and his own theory to a series of "tests" — historical, procedural, political and didactic. The most interesting of these (after the historical), and the one that throws most light upon the substantive law, is

[1] To sustain an action of theft, or an action for recovery *ex contractu* of things loaned by him, *etc.*, the bailee had need neither of title nor of "juristic" possession.

[2] Besitzwille, ch. xiii.

the "procedural test."[1] The "will theory," which grants or denies the possessory remedies according to the *animus* of the possessor, logically requires that the plaintiff in a possessory suit should allege and prove his *animus dominantis*. But to hold a plaintiff to prove his state of mind is absurd. All that can be required is that he should produce *indicia* of his state of mind, *i.e.*, facts which lead to the presumption that he has been possessing for himself. The most important fact of this sort is the title under which he came into possession — his *causa possidendi*. Accordingly, many authorities have held that the plaintiff must at least show a *causa possidendi* which indicates an intention to hold for himself, *e.g.*, inheritance, devise, purchase or gift. But the ejector and the thief are entitled, by Roman law, to possessory actions. Was it required in Roman practice that such plaintiffs should allege and prove violent ejectment or theft? The Roman practice, Jhering maintains, like that which generally prevails in the modern world, required of the plaintiff no proof save of his corporeal possession.[2] If the plaintiff held by force or stealth, or permission from his adversary, it was incumbent on the adversary to allege and prove this. If he held by lease or bailment, it was probably incumbent upon the defendant to allege and prove this. Such at least is the rational mode of distributing the burden of proof.[3] In a rational system of pleading, therefore, *animus* plays no rôle whatever. It never appears.

[1] Besitzwille, ch. ix. It seems clear that it was the failure of the "subjective theory" to stand the test of procedure that first led Jhering to question its truth. In the fourth of his Confidential Letters, printed in 1863, he describes an imaginary suit for protection on the ground of possession which a young practitioner tries to carry through on the basis of Savigny's theory, with a result most disastrous to his client. Scherz und Ernst, pp. 63 *et seq.*

[2] For Roman practice there is no direct evidence; but the assertion of Paulus, Sententiae, 5, 11, § 2, that to prove *delivery* it is necessary only to prove corporeal possession, makes in favor of Jhering's contention. So, I think, does D. 5, 3, 11, § 1 *et seq.* cited above (p. 279).

[3] So in the French law. Code Civil, art. 2230: "On est toujours présumé posséder pour soi et à titre de propriétaire, s'il n'est prouvé qu'on a commencé à posséder pour un autre." "An article," Jhering characteristically remarks, "that in my eyes is of more importance for practical life than all that the literature of this whole century has produced regarding the distinction between possession and detention." Besitzwille, p. 168.

If this is true, Jhering argues, is it not absurd to make will or intention the criterion of possession in our statement of substantive law? The true statement of the law is that natural possession as such is protected; that the corporeal possessor has not merely the right of self-defense, but the peculiar remedies given to the possessor. In two cases, however, the Roman law withdraws this protection; it refuses the possessory interdicts to lessees and bailees, not because they have the intention of holding for others, but because they are lessees or bailees. Their actual intention is of no consequence whatever; if they decide to hold for themselves, or for third parties, their change of mind has no effect upon their legal position, or upon that of the lessors or bailors for whom they originally agreed to hold. "No one," said the Roman jurists, "can change for himself his *causa possessionis*."[1]

Between the ruling "subjective theory" and his own "objective theory" there is, as Jhering recognizes, an intermediate opinion, which distinguishes juristic from natural possession by the *animus* or intention of the possessor, but which treats the actual will of the possessor as irrelevant. It attributes to him the "typical" will which a man in his position, with his *causa possessionis*, ought to have, and refuses to consider whether he has any other will. As Jhering points out, this theory really abandons will as the criterion of juristic possession, and substitutes positive legal rule. The typical will with which it operates is a mere legal fiction.[2]

To complete this sketch of Jhering's position on the legal topic which has most largely occupied the attention of German jurists in this century, it should be added that in opposition to

[1] Digest, 41, 2, 19, § 1.

[2] Besitzwille, pp. 15–20. Of all the representatives of the "causal theory," Dernburg, perhaps, comes nearest to Jhering's position. He writes in his Pandekten (2d ed., 1888), § 179: "The will to possess for one's self . . . is to be deduced from the situation (*Sachlage*). It results particularly from the ground — the *causa* — on which possession is taken. He who takes as owner or pledgee is juristic possessor; he who takes as lessee or agent is not juristic possessor." But farther back, in § 172: "Possessory relations constitute juristic possession only when the purpose of the possessor is to possess for himself, and when this purpose enjoys the recognition of the state."

the Roman, as well as to the dominant modern view, he asserted that possession is not a mere fact, nor merely a "legal relation," but a right.[1] Possession is unquestionably an interest, and possession is undoubtedly protected; and having defined a right as "a legally protected interest," Jhering was logically constrained to admit possession to the category of rights. To most jurists this deductive test of his definition must seem a proof that the definition is at fault. A "right" that figures in legal procedure only so long as the question of right is not raised, is surely a right of a very singular sort. In his *Possessory Intention* Jhering adheres to his earlier statement as far as juristic possession is concerned, but abandons the ground in the case of natural possession, which he declares to be only a "legal relation."[2] But since he maintains that even the natural possessor enjoys some protection, and that natural possession and juristic possession differ solely in the degree of protection accorded by the law, we obtain, from his premises, this result: a right is an interest which enjoys *a certain degree* of legal protection. What degree is necessary is left to every one to settle for himself.[3]

The principal conclusions which Jhering reached in his *Possessory Intention* seem to me sound; but, for my present purpose, the proportion of truth in this book and in his *Protection of Possession* is of less interest than the point of view which his readers were compelled to take and the kind of considerations which were urged upon them. Before Jhering wrote, the discussion of the law of possession had been conducted in the most abstract fashion. Very little consideration had been given to the practical operation of the rules; and in the search for the principle beneath them, it had apparently not been recognized that the social effect of the rules might

[1] Geist des römischen Rechts, 3d ed., part iii, div. 1, pp. 351 *et seq.*; "Der Besitz," in Jhering's *Jahrbücher*, 1893, pp. 63 *et seq.*

[2] Besitzwille, pp. 50, 51.

[3] In Besitzwille, *loc. cit.*, there is also a curious reversion to the will theory, discarded twenty years before in his Besitzesschutz. While the protection of juristic possession is still based on the interests of owners, the protection of natural possession is based on regard for "the realized will." And yet the only difference between juristic and natural possession is the amount of protection!

furnish a useful clue. In the first of these books he shifted the discussion from the plane of the abstract and ideal to that of the concrete and practical; and to one who had been ballooning through space in the company of the earlier writers — I speak from experience — the descent was jarringly sudden. To the mundane American mind the shock was slight, and its results exhilarating; but to Jhering's metaphysical countrymen it was obviously severe. With some of them, as with Keats's Endymion, the "first touch of the earth went nigh to kill."

For nine years after the appearance of his *Protection of Possession*, from 1868 to 1877, Jhering published but two small books — a collection of questions for discussion in moot-court,[1] and the famous *Struggle for Law*.[2] The cause of this relative reticence, on the part of a man whose mind was as active and whose temperament was as communicative as his, was his absorption in a task for which he felt and confessed himself inadequately prepared — the formulation of a philosophy of law. He was preparing the first volume of his *Zweck im Recht* — a title which I cannot translate literally, because the English language has no precise equivalent for *Zweck*. *Teleology of Law* may serve as a paraphrase. The *Struggle for Law* was primarily a large chip thrown out from his workshop — a special theme encountered, examined and dismissed into print — while he was elaborating his general doctrine.[3]

At an early stage of his campaign against what seemed to him the aberrations of German legal science, Jhering had become convinced that the cause of these aberrations was the general acceptance of a false philosophy. In dealing with the question of rights, in the last installment of his *Spirit of Roman Law*, he had discovered, as he believed, the basis of a true legal philosophy. Private rights exist primarily for the protection of private interests; but these private interests are themselves protected because they are at the same time public

[1] Jurisprudenz des täglichen Lebens (1870).

[2] Kampf ums Recht (1872).

[3] As the author points out in Zweck im Recht, 2d ed., vol. i, p. 75.

interests. All law exists for the furtherance of social ends, and "the end [*Zweck*] is the creator of the entire law." This, however, is true not only of law, but of morality, of social custom or usage, of etiquette, and even of fashion. The whole social life is governed by rules which are intended to subserve social ends; and these rules, worked out in social life and enforced by social pressure, constitute the system of social order. That which distinguishes social rules from mere social practice or habit [*Gewohnheit*] is their imperative character, the fact that society insists upon their observance, and inflicts upon those who disregard them pains and penalties. That which distinguishes the legal rule from the rule of morals or fashion is the nature of the sanction. The legal rule is enforced by "mechanical" or "external" coercion; behind it stands, in the last instance, the physical force of the community, and this force is directly exercised, in case of necessity, upon the person or the property of the individual. In early society this physical coercion is "unorganized": it appears as lynch-law, clan feud, self-help of the wronged party. In international law, at the present day, the physical coercion is applied in an analogous manner; but early law and modern international law are rightly designated as law, because, in last instance, the mechanical sanction comes into play. Within the modern state, of course, the application of physical coercion is reserved to the state and its governmental organs, and national law has thus become the command of the state. Rules of morals, of social usage, of fashion, *etc.*, are enforced by purely "psychological" or "internal" coercion. The sanctions are those of public opinion — disapproval, ridicule, contempt, ostracism. The field of manners and morals and of the "psychological" sanction is of course much wider than that of law; it includes nearly all the field of law, and a vast outlying territory. Of the way in which the legal and the purely social sanctions supplement each other, he writes:

The advantage of mechanical coercion by the state lies in the certainty of its operation: where it is applicable, it attains what it is meant to attain. But it is not applicable everywhere, and therein

lies its incompleteness. It is too unwieldy, too clumsy, to give effect to all the norms which society recognizes as necessary. . . . The advantage of psychological coercion by society lies in the fact that there is no relation of social life from which its influence is excluded. It forces its way in everywhere, like the air — into the inner chambers of the house and up to the steps of the throne, into regions where the mechanical sanction fails of all effect. Its weakness lies in the uncertainty of its operation: the moral judgment of society, of public opinion can be defied, but not the arm of the state.[1]

It will be seen that Jhering's conception of law is analogous to that of the English positivists; but it is by no means identical with theirs. Rules of modern national law, he declares, are *ordinarily* established by the state;[2] they are commands (*Imperative*) of the state; but it is not their enunciation by state authority, but their enforcement by state power that makes them legal rules. "The circumstance," he says, "that the state authority declares a rule does not give it the character of a legal rule, but only the circumstance that the state binds its organs to execute the rule by external coercion."[3] In his definition of law from the teleological point of view, the declaration of legal rules by state authority is not included. "Law is the totality of the conditions of existence of society that are assured by means of external coercion through the power of the state."[4] With the rejection, as a criterion of law, of the formulation of its rules by the state, disappears of course the difficulty which the English positivists encounter in

[1] Zweck im Recht, 2d ed., vol. ii, pp. 182, 183.

[2] *Ibid.*, vol. i, p. 331.

[3] *Ibid.*, vol. i, p. 337. "Rules that cannot be enforced by him who sets them up are not rules of law." *Ibid.*, vol. i, p. 318. Puchta (Pandekten, § 11, note g) had declared that where the legislator has abolished popular custom as a source of law, the result is only to deprive it of its operation upon the judge. It continues to exist as law, only the judge does not apply it. To this Jhering responds: "We might as well say that when fire is put out with water, it is still fire, only it does n't burn." He shrewdly adds that what led Puchta astray, was the possibility of voluntary obedience to certain rules within a certain circle. "If this is enough to give the rules the character of legal rules, then the rules of a prohibited association must be regarded as legal rules." *Ibid.*, vol. i, p. 322.

[4] "Recht ist der Inbegriff der mittelst äusseren Zwanges durch die Staatsgewalt gesicherten Lebensbedingungen der Gesellschaft." *Ibid.*, vol. i, p. 511.

bringing customary law under their definition.[1] And with the assertion that execution of law by the state is not essential to the conception of law in the widest sense, provided its rules are actually enforced by mechanical or external coercion, disappears also, as we have noted, the difficulty of including primitive national law and modern international law in the category of law.

It was not against the English positivists, however, that Jhering was defining his position, but against the German idealists. To these law is simply the expression of will — of God or of society or of the state ; and the rights accorded to individuals are recognitions of the liberty of the individual will, which is "in itself" free. Primarily — and this is what gave the book its name — Jhering insisted on going behind the will and considering the motive. This, he declares, is always something to be attained, an end (*Zweck*). Law is a means to the ends of society; rights are means to individual ends: neither law nor rights are intelligible unless we consider, in the case of every rule of law, the social end, and in the case of every right, the personal end. But from the social point of view the individual end is simply a means to securing social ends ; and neither personal rights nor their limitations can be fully comprehended from any other than the social point of view. Private rights exist only because there is a large domain of social life in which egoism, in pursuing its own ends, realizes the ends of society. It is only in this domain, where the individual interest harmonizes with the social interest, that private rights exist ; and they are exposed to limitation at the point where egoism menaces or even thwarts a social interest. Jhering illustrates this point by examining the social function of contract and that of private property, and by indicating the limitations which the law imposes upon freedom of contract and upon the employment and disposition of private property.[2]

[1] It is precisely because customary law still exists that Jhering qualifies with an "ordinarily" his statement that the rules of law are established by the state. See *loc. cit.* (vol. i, p. 331), note 2.

[2] Zweck im Recht, vol. i, pp. 264–291, 516, 518–534.

The *Teleology*, however, is more than a system of legal philosophy; it is a system of sociology.[1] It deals not only with law, but with economics, politics and ethics. Ethics, as Jhering insists, is neither a part of psychology and the twin sister of logic, nor a part of theology and the twin sister of dogmatics. It is a part of social science, and the twin sister of jurisprudence, of economics and of politics.[2] All morality — the recognition of what is moral, and the will to do it — is an historical product, the outcome of the life of man in society. The rules of ethics are no more absolute and eternal than those of law: moral rules, like legal rules, subserve the interests of society, and these interests vary according to the character of the social organization and its stage of development. The theory, of course, is not new. It seemed new to Jhering, when he was working it out in his own mind, because he was imperfectly acquainted with the literature of ethics. He had found nothing akin to his view except in the writings of the English utilitarians — some of which, notably those of Bentham, of Mill and of Spencer, had been translated into German and were thus accessible to him; and he differed from the English utilitarians in that he could not accept the happiness or welfare of the individual as the basis of morals.[3] To Jhering the social interest is the sole basis; and society, he declares repeatedly, cannot be constructed from the point of view of the individual.[4] When, however, after the appearance of the first edition of his second volume, a Roman Catholic ecclesiastic showed that Thomas Aquinas had clearly set forth both the social utility theory and the relativity of "practical" truth,[5]

[1] "In its present form," Jhering wrote later, "the work ought really to be entitled: *The Teleological System of the Moral Order of the World.*" Besitzwille, preface, p. x.

[2] Zweck im Recht, vol. ii, p. 125.

[3] Spencer's Data of Ethics was not, I think, accessible to Jhering when he wrote the second volume of Zweck im Recht. Jhering had before him such earlier writings of Spencer's as Social Statics. In the Data of Ethics more stress is laid upon social utility, but even in this work ethical rules seem to be the result of a compromise between social and egoistic interests.

[4] Zweck im Recht, vol. i, p. 537; vol. ii, pp. 170 *et seq.*

[5] Jhering quotes: "Firmiter nihil constat per rationem practicam, nisi per ordinationem ad ultimum finem, qui est bonum commune. . . . In speculativis est

Jhering was visibly taken aback. In his second edition he admitted, with admirable frankness, not only the prior enunciation of his theories by "that great intellect," but also the inexcusable character of his own ignorance. He adds, however, that the modern philosophers and the Protestant theologians are more to blame than he, a jurist.

> I ask myself, with astonishment, how was it possible that such truths, once uttered, should have been so completely forgotten in our Protestant science? From what aberrations it might have saved itself, had it taken these utterances to heart! I, for my part, would perhaps have left this whole book unwritten, if I had known of them.[1]

This apologetic outburst should be taken with more than a grain of allowance. These ideas seemed to Jhering of fundamental importance; had he known them to be Thomasian, it would probably have seemed to him his duty, so long as they had lost their influence on modern German thought, to reannounce them. Jhering had a just pride in his originality; but the desire of personal recognition was not the only motive that led him to write.

A more serious defect in his sociology, it seems to me, is that, in spite of his constant condemnation of the individualistic point of view, he has by no means wholly emancipated himself from it. He not only starts with the purely egoistic individual and works towards the socially minded man, — which is perhaps legitimate as a matter of pure dialectics, — but he constantly assumes that individual egoism is historically antecedent to all social evolution. That absolutely unhistorical being, "the natural man," who lived outside of all social bonds, recognized no social imperatives, sought only the attainment of his immediate selfish ends, is constantly assumed to be the real primitive man. Society apparently starts as a mere aggrega-

eadem veritas apud omnes, in operativis autem non est eadem veritas vel rectitudo practica apud omnes. . . . Humanae rationi naturale esse videtur, ut gradatim ab imperfecto ad perfectum veniat. . . . Ratio humana mutabilis est et imperfecta, et ideo eius lex mutabilis est. . . . Finis humanae legis est utilitas hominum." Zweck im Recht, 2d ed., vol. ii, p. 161, note 2.

[1] *Ibid.*, p. 161.

tion of such egoists, who coax and club each other into the pursuit of social ends.[1]

It is a result of this initial error that he obviously believes[2] that the pressure of society upon the individual has been increasing through the course of human history, and is likely to increase. On this point the studies of the modern sociologists and the researches of the younger school of legal historians[3] are pointing to a directly contrary conclusion. Man appears in history as a mere constituent particle in a horde: it is the horde that feels and wills and acts, carrying the individual with it like a drop of water in a wave. As society develops higher and more complex forms of organization, the demands of society upon the individual increase, indeed, in number and variety, — and it is this fact probably that has led Jhering and many others astray, — but at the same time the

[1] In his third volume, which was never written, Jhering intended to discuss the topics "sense of duty," "love," and "ethical self-assertion"; and he indicated the position which he proposed to take by saying: "I, too, come finally to the result that the individual is to carry morality within himself as the law of himself, and that in acting morally he only asserts himself: but I come to that point, I do not start from it." *Ibid.*, vol. ii, p. 102.

[2] But indicates his reluctance to believe, in a way that shows his instinctive good sense. *Ibid.*, vol. i, pp. 513 *et seq.*

[3] It has long been a commonplace of the writers upon Greek and Roman history that the absorption or "merger," to use a legal phrase, of the individual in the *civitas* was something so different from our modern conceptions as to be difficult to realize; but we have cherished the idea that a much higher degree of personal independence existed among our Teutonic ancestors. On this point the leading German legal historian of our day expresses a directly contrary opinion. "A prominent characteristic of early Teutonic law is the inflexible strictness with which it subjects the single person to the dominant social relations, and the single legal issue to the views of the whole social body. The individualistic character that is not uncommonly attributed to our earliest law, is wholly lacking. More than in later times is the individual fettered to the will and the usages of the various associations in which he moves. . . . The visionary ideal of Teutonic liberty in the primeval forest applied in fact only to the outlawed and outlandish men who were excluded from the circle of tribal companionship. . . . It is not the liberty of the individual, but the equality of all free partakers of the law that is peculiar to the earliest Teutonic system. This equality, however, could be maintained only by the high degree of coercion exercised upon the individual — a coercion, to be sure, which, if consciously felt at all, was scarcely felt as hardship or constraint, because the individual, as an integral part of the community, was dominated by its manner of regarding things." Brunner, Deutsche Rechtsgeschichte (1887), vol. i, pp. 111, 112.

intensity of the social pressure as a whole is progressively diminished.[1] Personal freedom increases, and with it the sense of individuality. In last analysis, individualism itself, as we understand it to-day, is the product of social evolution, and the freedom of the individual is not the starting-point, but the goal of human development. In this phase the Hegelian statement that the development of law is "the development of the idea of freedom," however it has been misconceived and misapplied, has in it a profound truth.

The contrary theory — that social evolution must have started with the purely egoistic "natural man" — nevertheless so dominated Jhering's thought that it determined the structure of his whole book. The question that he sets himself is: How is the individual brought into the service of society and induced to minister to its ends? His answer, so far as it is developed in the two volumes of which the work consists, is: Reward and coercion. Reward plays its chief rôle in economic life, and the long chapter[2] which deals with this subject is mainly devoted to economics. He apparently assumes that the development of commerce precedes the development of law and the state, and that the state is preceded by voluntary association for common ends. Coercion is then taken up, and first the "mechanical" coercion which is exercised by law. In the second volume he goes over into morals, developing his "historical-social" theory, and dealing *in extenso* with social usages which we are not accustomed to regard as either moral or immoral, but to which society constrains obedience by "psychological" coercion. The latter half of the volume is devoted wholly to manners — the last third (two hundred and forty pages) to courtesy (*Höflichkeit*). The motive that led Jhering

[1] To appreciate the truth of this paradox — that increasing variety of social demands is perfectly compatible with an increase of personal freedom — we need not go so far afield as do the historical sociologists. We see the same thing when we compare life in a small modern village with life in a great city. In the village the demands of the social life are fewer, and yet the social pressure, the restraining and coercive power of local sentiment, is greater than in the city. City life makes more demands upon the individual, and yet it leaves him really and consciously freer.

[2] Vol. i, ch. vii, pp. 93–233.

into this apparently remote field was the desire to demonstrate that all "social imperatives"— fashion, manners, morals and law — are adapted to social ends and subserve the "conditions of existence of society." To prove this for law alone seemed to him an imperfect solution of the problem. In spite of much serious thought, much keen analysis and many amusing divagations, this portion of the book is hard to read ; and the foreigner is impressed, as his countrymen have been, with the feeling that the devotion of several of Jhering's best years to the study of social manners was a regrettable waste of energy. Whether Jhering himself felt this, or recognized only the fact that for the first time he had not "scored" either with his colleagues or with the public, the result was the same. He wisely abandoned the attempt to complete his "teleological system of the moral order of the world" — if carried out on the scale set in his second volume, its completion would have necessitated not merely a third but probably a tenth volume — and returned to legal investigations. One separate book was thrown off in connection with his labors on the second volume of the *Teleology of Law*, as the *Struggle for Law* had been thrown off while he was writing the first volume. This dealt with "fees" — not lawyers' fees, however, or even professional fees in general, but *Trinkgelder*.[1] It attained the moderate success (for Jhering) of a third edition, as did ultimately the *Teleology* ; but it met with even greater professional disapprobation than the second volume of the larger work.

Reading the *Teleology* again, as I have done for the purposes of this article, I am struck with the fact that the digressions are the most readable parts of the book. So long as Jhering clings to the main thread of his argument, he is almost tedious — a proof, if one were needed, how far he had strayed from his proper field. In his excursions, however, he is invariably interesting. So, for example, in his eloquent protest against *laisser-faire* in the law of contracts ;[2] so in his discussion of the difference between wages and governmental

[1] Das Trinkgeld, 1882 ; 3d ed., 1889.

[2] Zweck im Recht, vol. i, pp. 132–140.

salaries, where, after pointing out that salaries are not based, like wages, on the value of the service, since the state pays only partly in cash and the rest in honor, he adds that the correction is found in "the rich wife," who represents the partial conversion of the honor into cash ;[1] so in his denunciation of joint-stock companies, or rather of the absence of control over these companies which marked their first appearance in Germany, and led to the same abuses there as in other countries ;[2] so in his vehement attack upon the jury as an institution that formerly subserved important ends, but has outlived its usefulness ;[3] so in his demonstration of the advantages of a strict criminal code to the criminals themselves, since popular justice is far more cruel than the most Draconian system administered by government — an admirable text for a sermon on the significance of lynch-justice in our own country ;[4] so in his analysis of the principle that underlies the prevention of cruelty to animals, where he shows that the purpose of such laws is purely social, that they are made for the sake of man, and that to explain them by attributing rights to animals would logically constrain us all to become not only anti-vivisectionists, but vegetarians.[5] Quite in his best vein is the exhortation addressed, in the second volume, to students of ethics, not merely to investigate their problem historically, but to start with comparative philology and mythology, since these are "the oldest and most trustworthy witnesses as to primitive popular views of morality."

The two together may be described as the palæontology of ethics. In the deeds of the gods, in all that they permitted themselves and were able to permit themselves without forfeiting in the eyes of the people their claim to veneration, there is preserved for us the most ancient judgment of humanity as to what is morally permissible. . . . The gods are the petrified types of the prehistoric moral man.[6]

[1] Zweck im Recht, vol. i, pp. 200, 201.

[2] *Ibid.*, vol. i, pp. 220–225.

[3] *Ibid.*, vol. i, pp. 408–420.

[4] *Ibid.*, vol. i, p. 461.

[5] *Ibid.*, vol. ii, pp. 141–144. Incidentally this argument shows how shallow is Macaulay's famous fling at the motive which actuated the Puritans in suppressing bear-baiting. The Puritans were quite right.

[6] *Ibid.*, vol. ii, p. 126.

Not, perhaps, the most valuable, but certainly the most amusing pages in this volume are devoted to the teleology of fashion (*die Mode*). Fashion expresses, to him, the supposed interest of a social class — the class which commonly calls itself "society." It represents the constant effort of this class to distinguish itself externally from the common herd.[1] In these days of democratic equality, of improved manufacturing processes and of facile and rapid production, the imitative herd presses so closely upon its betters that these are unable to maintain any semblance of differentiation otherwise than by constant change. All that they can do is to keep a little ahead of their pursuers. Hence, the rapid changes of modern fashion.

But to revert to more serious matters. It is refreshing, in these over-sentimental days, to see the social value of force so fully recognized and so courageously proclaimed as we find it in this work. All law, all right, Jhering maintains, are based historically upon triumphant force: they are "the policy of force." Law is thus at first the mere servant of power. But "at the moment that power calls in law to announce its commands, it opens its house to justice, and the reaction of law upon power begins. For law brings with it as inseparable comrades, order and equality."[2] But not even in the highest civilization does law become lord of power. "Power, if need be, can exist without law: it has proved that it can. But law without power is an empty name."[3] To-day, when we speak of the reign of law, we think of power as merely the servant of law; "but at times the relation is reversed; power casts off its obedience to law and itself sets up a new law." Organized power revolts against law in the *coup d'état;* unorganized power, in the revolution.

It is easy for legal theory to condemn these acts; but these disturbances ought to lead our theorists to take a different view of the

[1] Zweck im Recht, vol. ii, pp. 230–241. Substantially the same theory was set forth a number of years ago in an editorial in the New York *Evening Post* on the question "Should a Dude wear White Gaiters?" The identity of the theory will scarcely justify a suspicion of plagiarism: it was undoubtedly a case of the attainment of the same truth by independent thinkers.

[2] *Ibid.*, vol. i, p. 353.

[3] *Ibid.*, vol. i, p. 253.

normal state of things. Law is not the supreme good: it is not itself an end, but merely means to an end: the end is the existence of society. If society cannot exist under the established legal order, and if the law itself is unable to find a remedy, power intervenes and does what is demanded.[1]

In case of necessity the law itself permits the individual to do with impunity what under other circumstances would be criminal. To meet exceptional emergencies, exceptional powers are constitutionally accorded to most governments: the proclamation of a dictatorship or of martial law, the suspension of existing law, the establishment of provisional law by executive ordinance, *etc.* These are "safety-valves which permit the power of the state to deal with crises legally."

> But the *coup d'état* and the revolution are no longer on legal ground: the law cannot license them without stultifying itself; from the legal point of view they are simply to be condemned. . . . But higher than law stands life; and if in fact the situation is such as is here presupposed, if there is a case of necessity that narrows the issue to law or life, there can be no doubt as to the decision — power sacrifices law and preserves life. . . . Our judgment concerning such acts is determined by their success. Appeal is taken from the legal forum which condemns them to the tribunal of history. This has always been deemed by all people the higher, the supreme instance, and the judgment that is here rendered is final and decisive.[2]

That private rights have their historic basis in successful force, Jhering had asserted five years before (1872) in his *Struggle for Law.* He had also shown that the value attached by society to a legal rule, or by the individual to a legal right, is exactly proportionate to the importance of the social or individual interest which the law secures. But the central thought in the *Struggle for Law* is the duty of the individual to assert and enforce his rights, not only for the sake of his own manhood, but for the sake of society. It is a lay sermon addressed to the conscience of his readers. Like most books that make an impression, the *Struggle for Law* is one-sided. In spite of the care with which Jhering confines his argument to cases where

[1] Zweck im Recht, vol. i, p. 250. [2] *Ibid.*, vol. i, pp. 251, 252.

something more than money is at stake, — to cases where submission to wrong is sacrifice of personal dignity and of social interests, — the book impresses the reader as a *laus litium*, a panegyric upon quarrelsomeness. But, however one-sided, the book is substantially true ; and the side of truth which is here turned to the reader is one that the modern man needs to have shown him. To this fact and to the warmth and eloquence with which the duty of resentment and litigation is presented the *Struggle for Law* owes its phenomenal success. In 1880 it had been translated into fourteen other languages,[1] and in 1891 it reached its tenth German edition.

The *Struggle for Law*, if widely read, was also widely criticised ; nor did Jhering's critics confine themselves to his main theme. The position taken by him on minor points invited and aroused controversy. No part of the book attracted more attention, nor did any arouse more dissent, than his discussion of the case of Shylock *vs.* Antonio in *The Merchant of Venice*. Jhering asserted that the decision of Bellario-Portia was unjust. The plaintiff should have been thrown out of court because his contract for a pound of Venetian flesh was immoral. But if this was not possible at Venetian law, — and of course the poet was free to make the law of Venice such as suited his dramatic purpose, — Shylock should have had his pound of flesh. He should have been allowed to take a trifle more, if the excess was due to a pardonable error of judgment ; he could certainly take as much less as he chose ; and he was entitled to as much blood as would naturally flow in the course of the operation. It was grossly unjust first to recognize the validity of his contract and the lawfulness of his claim, and then to avoid the contract and defeat the claim by such wretched, pettifogging technicalities as those to which the court resorted — technicalities which the crude and formalistic code of the XII Tables, in providing for the distribution (*in partes secare*) of the body of the delinquent debtor among his creditors, seems to have intended to bar by the clause : "*Si plus minusve secuerint, sine fraude esto.*"[2]

[1] Kampf ums Recht, preface to sixth edition.

[2] *Ibid.*, 6th ed., pp. 58, 59.

It is not difficult to see how Jhering was led to take this position. He was insisting upon the solidarity of law and rights — upon the necessity, for the maintenance of law, of the enforcement of private rights ; and nowhere in literature was a more energetic expression of this idea to be found than that which Shakspere put into the mouth of Shylock :

> This pound of flesh, which I demand of him,
> Is dearly bought, is mine, and I will have it.
> If you deny me, fie upon your law !
> There is no force in the decrees of Venice.

Jhering was also exalting the duty of the individual to assert his rights ; and nowhere in history or fiction could he find a person more bent upon this course than Shylock. But in order to make of Shylock a proper champion, it was absolutely necessary to insist that he was in the right. In order to make of him a sympathetic figure, Jhering has to go further, and to import into Shakspere's comedy the essentially modern view that Shylock is the type of his wronged and flouted race, "of the mediæval Jew, that social pariah, who cried in vain for law."

> The tremendous tragedy of his fate does not lie in the fact that law is denied him, but in the fact that he, a Jew of the middle ages, has faith in the law — one may say, just as if he were a Christian — a faith in the law that is firm as a rock, that nothing can cause to waver, and that the judge himself strengthens; until the catastrophe breaks upon him like a thunderbolt, shaking him out of his dream and teaching him that he is nothing but the outlawed Jew of the middle ages, who gets his right in being swindled out of it.[1]

Jhering's view of this case has met with little sympathy. It has been criticised both from the literary and the legal point of view. Of the many answers that have been made by lawyers, I single out for mention that of Kohler.[2] He agrees with Jhering

[1] Kampf ums Recht, 6th ed., p. 59.

[2] Kohler, Shakespeare vor dem Forum der Jurisprudenz (1883), pp. 3 *et seq.*, 71 *et seq.* This is a curious book, too little known to English readers. The author has gained the conviction by "prolonged juristic and æsthetic studies" that the English poet possessed "an almost superhuman power of intuition," by virtue of which

that the decision is technically indefensible, but maintains that it is nevertheless just. It is simply a case of a correct decision on wrong grounds. Such decisions, he urges, are especially common where the development of the law has been outstripped by the development of ethics. That was the case, clearly, in the Venice of Shakspere's imagination. The harsh law of debt, which subjected the delinquent debtor completely to the power of his creditor, was still law, but it no longer corresponded to the contemporary sense of right. Shylock, in attempting to utilize the law for purposes of vengeance, brought the antithesis between the law and the moral sense of the community to distinct consciousness, and placed upon the old rules a strain that they could no longer bear. They give way, and a new and milder law appears — not yet clearly formulated; attained, indeed, by false reasoning and untenable distinction; but capable of logical formulation in the further process of judicial interpretation.

To an outsider, this explanation of Kohler's seems so thoroughly in the line of Jhering's own thought as revealed in many passages of his legal-historical writings, that one is tempted to wonder whether Jhering would not have accepted it if the *Struggle for Law* had been written by a third person. Since, however, the position assailed by Kohler was his own and not another's, he came to its defense in a note appended to his seventh edition, in which he carried the war into the enemy's country, and made merry with Kohler and his methods of studying legal history. To this counter-attack, Kohler responded, with a *Nachwort* which, I believe, was the last word in this controversy. In this characteristically academic interchange of incivilities, the only fresh point brought out was Jhering's insistence that a definite and complete judgment had been rendered

he was able to penetrate "the most secret recesses of legal history, as of history in general." He discusses The Merchant of Venice from the point of view of the law of debt, Measure for Measure from that of *desuetudo* and pardon. Hamlet depicts the conflict between the custom of blood revenge and the more advanced morality which leaves vengeance to God and penalty to the state. A closing section is devoted to the legal material in the other plays. In the book as a whole there is a great deal more law than Shakspere, and a vast if somewhat heterogeneous collection of information about early law in general.

in Shylock's favor before any information was given him touching the consequences of a miscalculation in weight or of incidental blood-letting, — that his right was not denied in the judgment, but frustrated when it came to the execution of judgment, — while Kohler insisted that the utterances of Portia, from "A pound of that same merchant's flesh is thine" to "Thou diest, and all thy goods are confiscate," constitute a single original and integral judgment. One cannot help wondering what the poet would have made of this entire controversy : whether he would have been more surprised at learning that *The Merchant of Venice* was a tragedy, as Jhering asserts, or at being informed by Kohler that he had divined all the subtle modes in which progressive views of ethics obtain recognition in the application of law.

It was Jhering's original plan to conclude his *Teleology* (after he should have worked through the fields of manners and morals) with a detailed demonstration of the value of his point of view for the comprehension of law, both as regards its general principles and its more important institutions. His *Possessory Intention*, as he explains in the preface,[1] represents a partial realization of this broader plan : it is an expanded section of the projected final chapter of the *Teleology*. That is the significance of its sub-title : *Also a Criticism of the Dominant Juristic Method.*

For twenty years (1868–1888) Jhering had devoted his best energies to the task of elaborating and illustrating his philosophy of law. The work in which he undertook to develop his system was indeed left unfinished, but the system itself was clearly set forth. Against the will as the source of law and of rights he had set the goal of the will, the end to be attained. Against the individual interest he had set, as the creator of the whole social order, the social interest. Against the theory of the historical school, which treated all legal development as a process not merely organic but largely unconscious, he had insisted on the reflective and conscious character of legal progress, even in its early stages. He had not, however, fallen

[1] Besitzwille, pp. x, xi.

into the error of asserting that all law is consciously created to attain ends distinctly discerned: the ends which society strives to realize are not all "subjective," *i.e.*, consciously formulated; "objective" ends play a great part.

It is not easy for men of English blood and traditions to realize the necessity of the task which Jhering had undertaken. The point of view which we naturally take was expressed, a year or so after the appearance of the first volume of the *Teleology of Law*, by an American fellow-student in Göttingen. "Is it not odd," he said to me, "that Jhering should be writing a big book to prove what no English or American lawyer would dispute?" A few months earlier, however, I had received striking evidence that what is self-evident to an Anglo-Saxon is not necessarily self-evident to a German. I had had a conversation at Berlin with an elderly German friend — a judge, for many years, of the highest Prussian appellate court. This gentleman had shown a kindly interest in my studies and plans, and to him I spoke of my intention to spend the following semester at Göttingen, for the sake of hearing Jhering. "For heaven's sake," said the judge, "don't do it. Jhering will mix you all up. His *Geist* was a clever book, but his *Zweck* is all nonsense [*dummes Zeug*]."

During the years devoted to his *Teleology* and to the books that branched out from that main stem, Jhering did not devote all his leisure to fighting philosophy with philosophy. He recurred more than once to his earlier and more congenial mode of attack — *ridendo dicere verum*. The authorship of the *Confidential Letters* had ceased to be a secret, and a second series had been solicited and promised as early as 1872. In 1880 Jhering redeemed his pledge in a series of "feuilleton" articles, as he himself described them, which were published at Vienna in the *Juristische Blätter* under the running title: *Chats of a Romanist.*[1] These essays dealt entirely with questions of Roman legal history; and while the practical point of view, the consideration of the "end" subserved, is constantly utilized for

[1] Plaudereien eines Romanisten. Reprinted in Scherz und Ernst (1885), pp. 121–243.

the better understanding of the rules discussed, the *Chats* are more akin to Jhering's *Spirit of the Roman Law* than to his *Teleology;* they rather form a part of his constructive work in legal history than of his polemic against abstract jurisprudence. But when, after the appearance of the second volume of the *Teleology*, he was urged to republish both the *Letters* and the *Chats*, he rounded them into a book — *Jest and Earnest* — by adding new matter,[1] in which he returned to the theme of the *Letters*. Employing the time-honored machinery of the dream, Jhering depicts himself as a newly disembodied spirit, transported by the double title of Romanist and theorist to "the juristic heaven of concepts." This lies far beyond the solar system, in outer darkness. "The sun," his guide informs him, "is the source of all life, but concepts cannot accommodate themselves to life: they need a world of their own in which they may exist for themselves solely, remote from all contact with life." The obscurity of this heaven is no disadvantage to the theorist: "even on earth his eyes have been trained to see in the dark." Candidates for admission must first pass through quarantine for the removal of any trace of earthly air, and they receive, if necessary, a draught from a spring whose waters efface all earthly points of view, — but Jhering is assured that "very few who apply for admission here find it necessary to make use of it." The applicants come chiefly from Germany, and thence only of late years: Puchta was the first. They are for the most part Romanists, but Germanists and criminalists are also received, "provided they share with the Romanists their faith in the sovereignty of concepts." Professors preponderate, but there are also "members of your Imperial Diet and your Houses of Deputies, whose belief that the world is ruled by abstract principles has remained, thank God, unshaken by your Bismarck." An examination is required for admission: it is indispensable that the candidate show "capacity to construct a legal institution purely from the texts or from the abstract concept, without any consideration of its real practical signifi-

[1] Im juristischen Begriffshimmel, ein Phantasiebild; Wieder auf Erden, — wie soll es besser werden? Scherz und Ernst, pp. 247–383.

cance." Savigny very nearly failed: he was admitted, however, on the strength of his essay on possession, and because, by opposing codification, he had aided in maintaining Roman law in Germany. Arndts and Wächter were both rejected: Wächter's mind "moved always in the lower region of the practical"; and although Arndts had based his *Pandects* on Puchta, "he had made too many concessions to the needs of practical life at the cost of pure theory."

Before attempting the examination, Jhering finds that it is admissible to inspect the abode of the theorists, and of this opportunity he gladly avails himself. He examines the palæstra, or field for gymnastic exercises in construing, interpreting, *etc.;* the legal-historical academy, where defective inscriptions and corrupt texts are "restored"; the museum of pure concepts (which has no doors, and to enter which it is necessary *mit dem Kopf gegen die Wand zu rennen*); and the pathological cabinet, which displays these same concepts as they have been defaced and distorted on earth from the days of the Roman jurists down, through considerations of expediency. In the examination of these and other objects of interest, and in conversation with his guide and other blessed spirits, Jhering finds full opportunity to satirize his abstract contemporaries and their theories. Convincing himself, before long, that he does not belong in this heaven, Jhering finds that two other localities are open to him — the heaven of the legal philosophers, where reason takes the place of abstract ideas, and the heaven of the practitioners. The former is the abode of the advocates of natural-law doctrines; and the information which Jhering receives concerning the examination held there and the confession of faith exacted of all applicants shows him that he cannot hope for admission to that paradise. He decides, accordingly, upon the heaven of the practitioners, and is conducted thither. As he knocks at the gate, he awakes.

In a closing section, from which I have already made citations,[1] Jhering discusses seriously the evil results of an over-abstract jurisprudence, its causes and its remedies. The chief cause he

[1] POLITICAL SCIENCE QUARTERLY, X, pp. 687 (December, 1895), *et seq.*

finds in an undue separation of theory and practice. His remedies are : that the university teachers of law be required first to pass a number of years in the practical work of the courts, as assessors ; that the case system of instruction be more largely employed in the universities, and that participation in the *Practica* be required of the students ; that in the state examinations less stress be laid upon written themes and more upon the oral examination, and that in the latter more weight be attached to the solution of concrete cases. He is speaking, of course, of the state examinations for admission to the judicial service and to the bar, not of the academic examination for the doctorate. Two changes suggested by others he emphatically disapproves. The law professors are not to combine practice with instruction, nor is the three-year course of academic study to be lengthened. Three years, he thinks, are enough if properly employed.

Of the justification of Jhering's crusade against abstract jurisprudence — of the necessity of such a reaction in Germany as he strove to produce — I have already spoken. The tendency to undue abstraction was of course at no time universal : there were contemporaries of Jhering as practical as he himself could desire, and among them were professors (like Eck) who strove always to impress their students with the importance of the practical point of view. But the tendency which Jhering combated was certainly dominant, and Jhering made himself the most prominent champion of the opposite movement.

Of the effect of his opposition it is hard to form a definite judgment. That German legal science is to-day more practical than it was thirty years ago, no one who has followed its development ever so cursorily can for a moment question. But how far this change is due to Jhering's efforts, and how far it is due to the pressure of practical legislative problems in the new German Empire, is a question on which it would be rash to express an opinion.

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